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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID JON MILLER,

Defendant and Appellant.

G055517

(Super. Ct. No. 17HF0224)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Terri K. Flynn-Peister, Judge. Affirmed.

Chambers Law Firm and Dan E. Chambers for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and James M. Toohey, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant was convicted of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)). He was sentenced to the middle term of three years in state prison.

On appeal, he raises a single issue. He contends the court erred in admitting prior inconsistent statements of a percipient witness. The witness, who was with defendant on the day in question, claimed he could remember virtually nothing from that day. When asked to identify defendant, he claimed he could not see well, but refused the court's offer to get closer. He was also unwilling to review documents to refresh his recollection. The court found he was being deliberately evasive and admitted prior statements he had made to an officer on the day of the incident. Defendant argues the court erred because the witness was simply forgetful, and thus the statements did not qualify as prior inconsistent statements to overcome a hearsay objection. We affirm.

FACTS

On February 15, 2017, around noon, the victim was walking down the street in front of a hotel in San Clemente. She had her headphones in her ears and was listening to music on her phone. *Mr. Torres, the percipient witness at the heart of this appeal, was driving defendant's recreational vehicle (RV) at that time.¹ Defendant was sitting in the passenger seat of his RV when he pointed to the victim walking and stated, "Oh, there's that bitch." Mr. Torres understood him to be talking about the victim. Defendant then got out of the RV and walked in the victim's direction. Another passenger, Ms. Pittock, was in the RV at the time and confirmed that Mr. Torres was driving the RV at the time.*

Defendant, whom the victim had first met a couple of months earlier, walked up behind her and said, "Yeah, it's me bitch." When he said that, she did not

¹ For ease of reference, we have italicized the facts that came in through prior inconsistent statements.

know who it was. But when she turned, she recognized it was defendant. As she was about three-quarters turned, he punched her in the face with a closed fist. He then grabbed her hair with two hands and threw her into the street. The force of the landing injured her wrist. The force of being thrown caused her new blue Samsung cell phone and mirrored aviator sunglasses to fall to the ground. Defendant was laughing at her from the beginning of the assault and told her he was going to “beat [her] like a man.” While she was still on the ground, defendant picked up her cell phone and sunglasses and walked back toward his RV.

The victim got herself up off the ground and began following him, saying, “Look, I just want my stuff back, dude. I’m not gonna say anything. I’m not gonna call anybody. I don’t want to talk to anybody. I just want my belongings back.” Defendant turned around and wrapped his hands around her neck, began strangling her, and said, “What are you gonna do, [victim’s first name]? What are you gonna do? You’re gonna rat? What are you gonna do? You’re gonna rat, aren’t you?” He continued strangling her for 25 to 30 seconds. While he was strangling her, she could not breathe or speak. The force of the strangling caused her to drop to her knees. When defendant released the victim, he got into his waiting RV and drove away. The victim recognized that her friend, Mr. Torres, was driving the RV. The victim was familiar with defendant’s RV because she had recently lived in it with defendant and her ex-boyfriend for about a month from December 2016 until January 2017. After getting into the RV, he said, “I just hit that bitch like a man.”²

After defendant drove away, a passerby who had witnessed the end of the encounter stopped his truck to ask if she was okay. The victim was crying at the time but briefly explained what had happened, including that defendant had stolen her phone, what direction the RV had driven, and a basic description of the RV. The passerby left in his

² The evidence for this statement was the testimony of Ms. Pittock as well as a prior inconsistent statement by Mr. Torres.

truck to find the RV. He saw defendant's RV, but he was not sure what to do so he returned to the victim's location after about five minutes. He then drove her, at her request, to a nearby campsite. He noticed she was bleeding from somewhere on her hand or arm. It appeared to him that it was "road rash" as if she "fell on the concrete."

After dropping the victim off at the campsite and going about his way, the passerby happened to spot the same RV again. He pulled up next to the RV and told them to pull over and he was calling the police because "they beat up a girl." After he received no response, he took a picture of the license plate and called the police. While speaking with a 911 dispatcher, he followed the RV until it parked and law enforcement arrived.

An Orange County Sheriff's deputy responded to the location of defendant's RV. He spoke with Ms. Pittock. He asked her if she knew of a Samsung Galaxy phone in the RV. In response, she picked up the victim's Samsung phone from a clear plastic container on a counter inside the RV. She told the deputy that defendant had hidden the phone in the container and had said the phone belonged to the victim. During his search of the RV, the deputy found the victim's aviator-style sunglasses in the glove compartment.

About the same time, a police officer drove the victim to defendant's location and she identified him as the person who had robbed her.

DISCUSSION

Defendant's sole contention on appeal is that prior inconsistent statements by Mr. Torres should have been excluded as hearsay because they were not, in fact, inconsistent—he simply could not remember the events of that day. We begin by discussing the relevant legal principles, and then detail the testimony from Mr. Torres that led the court to find he was being deliberately evasive.

Evidence Code section 1235 establishes an exception to the hearsay rule for a witness's prior statement "if the statement is inconsistent with his testimony at the hearing" (*Ibid.*) "Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 78.) However, if "a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied." (*Ibid.*) The test for admission of a witness's prior statement is not the existence of an express contradiction but rather inconsistency in effect. (*People v. Ervin* (2000) 22 Cal.4th 48, 84.) This test also applies to a forgetful witness. (*Ibid.*) If "a reasonable basis in the record" (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219), supports the conclusion that a witness's claimed inability to remember is "evasive and untruthful, admission of his or her prior statements is proper" (*id.* at p. 1220). The "reasonable basis" standard already implies significant leeway for the court to make such a finding. And our review is limited to whether the court abused its discretion. (*People v. Cowan* (2010) 50 Cal.4th 401, 462.)

As defendant concedes, "Mr. Torres had poor recall of most of the events that took place" on the date of the robbery. For example, he did not remember being with defendant that day. He did not remember driving the RV that day. He did not remember being with Ms. Pittock that day. He did not remember multiple police officers coming out and speaking with him that day. He did not remember seeing the victim that day. He was asked about various statements he allegedly made to police, none of which he remembered. He did not remember telling law enforcement that he saw the victim while he was in the RV, and he refused an opportunity to review a police report to refresh his recollection. He was given a second opportunity to review a police report to more generally refresh his recollection from that day, which he refused. Finally, while he admitted knowing defendant, when asked to identify defendant in court, he replied, "Uh, I mean, I don't really have my glasses, so I can't really see too good right now." The

court offered to allow him to lean forward to get a better view, but he declined to do so, saying it would not help him.

In response to a hearsay objection to testimony from the responding deputy about statements Mr. Torres made to him, the court found Mr. Torres to be deliberately evasive. “It was fairly clear to the court that Mr. Torres was unwilling to answer anything regarding the [date in question]. I had asked him to lean forward to look; he said that wouldn’t help him. He claimed he could not see very well, but he didn’t really seem to have a problem not seeing anything other than attempting to identify the defendant. He was unwilling to look at anything and make any attempts to refresh his recollection, so I do believe there was some sort of deliberate attempt on the part of Mr. Torres to not answer any questions; and he just kept saying, “I don’t remember.” I think, then, Evidence Code [section] 1235 should not be precluded to apply in this situation when a witness is deliberately evasive like that. So I do think it applies, and I’m gonna allow the questions regarding Mr. Torres.”

The only evidence defendant points to as suggesting an abuse of discretion is that Mr. Torres was testifying under a grant of immunity, but Mr. Torres, incredibly, even claimed not to remember that fact. Defendant also points to the fact that Mr. Torres remembered more general information, such as knowing defendant, and having been in defendant’s RV a few times in the past. But these facts are very, very far from establishing an abuse of discretion. Reviewing the entire testimony, the court clearly did not err in deeming Mr. Torres to be an evasive witness and admitting his prior inconsistent statements.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.